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Ask Questions First and Shoot Later: Constraining Frivolity In Litigation Under Rule 11

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COMMENT

Ask Questions First and Shoot Later: Constraining Frivolity In Litigation Under Rule 11

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> Lawyers sometimes file first and think later. This may impose on the other party the costs of deciphering the pleading, running down the cases, informing the court, and putting things right. One of the premises of the legal system, however, is that each party should bear its own expenses and not fob them off on the other side.[1]

I. INTRODUCTION

If at first you don't succeed, try, try again. At least that is what one litigious scoundrel thought. "For more than three decades, [Joseph W.] Di Silvestro has been bringing lawsuits, each unsuccessful, in connection with his claim that in the 1940's he was wrongfully deprived of veteran's disability benefits in connection with his World War II service."[2] Di Silvestro began his adventures by suing the United States Veterans Administration.[3] Little did the trial court

1. *In re* TCI Ltd., 769 F.2d 441, 442 (7th Cir. 1985).

2. Di Silvestro v. United States, 767 F.2d 30, 31 (2d Cir. 1985) (citations omitted).

3. Di Silvestro v. Veterans Admin., 81 F. Supp. 844 (E.D.N.Y.) (dismissing complaint), *aff'd*, 173 F.2d 933 (2d Cir.), *motion to vacate order dismissing complaint denied*, 9 F.R.D. 435

know, when dismissing the complaint, that three decades would come and go, but Di Silvestro would not.[4]

The climbing cost of litigation is a serious problem plaguing the American judicial system,[5] and has resulted in a steady move for reform. The clarion call has been sounded by the general public,[6] from the halls of academia,[7] and by the Chief Justice of the United States.[8] The Di Silvestro case is an extreme example of abuse of the system, one cause of the overall problem. Pleadings not well-founded in fact or law are one example of such abuse. "Resort to frivolous litigation, maintenance of baseless defenses, and harassment of one's opponent are practices that judges and lawyers engaged in civil litigation encounter regularly."[9]

In *Roadway Express, Inc. v. Piper*,[10] the Supreme Court addressed the problem of abusive litigation.[11] *Roadway Express* originated with a civil rights action.[12] As the litigation proceeded, the plaintiffs failed to comply with the defendant's requests for interrogatories, did not appear at a motion hearing, acted with total disregard for the court's request for briefs by unduly delaying the process, and, on one occasion, completely failed to respond to the judge's request for a brief.[13] The trial court dismissed the action and subsequently granted the defendant's motion for costs and attorney's fees brought, in part, under 28 U.S.C. § 1927, which provides for awarding costs against a party who multiplied proceedings and engaged in vexatious

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(E.D.N.Y. 1949), *amended complaint dismissed*, 10 F.R.D. 20 (E.D.N.Y.), *aff'd*, 181 F.2d 502 (2d Cir.) (per curiam), *cert. denied*, 339 U.S. 989 (1950).

4. *Di Silvestro*, 767 F.2d at 31-32.

5. *See generally Symposium: Reducing the Costs of Civil Litigation*, 37 RUTGERS L. REV. 217 (1985)[hereinafter cited as *Symposium*].

6. Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 219 (1985).

7. *Id.* (citing Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38).

8. *See Symposium*, *supra* note 5, at 217-18.

9. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 182 (1985).

10. 447 U.S. 752 (1980).

11. The *Roadway Express* Court noted:

> Due to sloth, inattention, or desire to seize tactical advantage, lawyers have long indulged in dilatory practices. Cf. C. Dickens, Bleak House 2-5 (1948). A number of factors legitimately may lengthen a lawsuit, and the parties themselves may cause some of the delays. Nevertheless, many actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially the liberal rules for pretrial discovery. The glacial pace of much litigation breeds frustration with the federal courts and, ultimately, disrepect for the law.

Id. at 757 n.4 (citations omitted).

12. Monk v. Roadway Express, Inc., 73 F.R.D. 411 (W.D. La. 1977).

13. *Id.* at 412-13.

litigation.[14] On appeal, the circuit court vacated the award of attorney's fees.[15] The Supreme Court affirmed, holding that section 1927 did not allow an award of attorney's fees.[16] In so holding, the Court was sensitive to the "American Rule"[17] on attorney's fees, which has traditionally required each party to bear its own litigation costs.

Roadway Express prompted Congress to amend section 1927 to provide for "recovery of expenses *and attorney's fees* in addition to costs"[18] in cases involving multiplicity of proceedings and vexatious litigation.[19] The 1980 amendment to section 1927, however, did not go far enough because it required a subjective showing of bad faith.[20] Moreover, "[it] remained limited . . . to sanctions against attorneys and to conduct which [was] *both* unreasonable and vexatious."[21]

In addition to section 1927, the courts attempted to curtail abusive litigation through the Federal Rules of Civil Procedure. Prior to

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14. *Id.* at 413.

15. Monk v. Roadway Express, Inc., 599 F.2d 1378 (5th Cir. 1979).

16. *Roadway Express*, 447 U.S. at 759. The Court relied on the historical background of 28 U.S.C. § 1927 in reaching its conclusion:

> Congress enacted the first version of § 1927 in 1813. It was drafted by a Senate Committee appointed "to inquire what Legislative provision is necessary to prevent multiplicity of suits or processes, where a single suit or process might suffice. . . ." 26 Annals of Cong. 29 (1813). The resulting legislation provided in part that any person who "multiplied the proceedings in any cause . . . so as to increase costs unreasonably and vexatiously" could be held liable for "any excess of costs so incurred." Act of July 22, 1813, 3 Stat. 21.

Id.

Although the Court cited the Act of 1813, several commentators have presumed that the Act incorporated the "American rule," which militates against awarding attorney's fees. *See* Mallor, *Punitive Attorneys' Fees For Abuses of the Judicial System*, 61 N.C.L. REV. 613, 615-19 (1983); Schwarzer, *supra* note 9, at 205-06 app. Cf. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1976) (invoking the American rule to reverse an award of attorney's fees in a "private attorney general" action brought to prevent the construction of the transAlaska oil pipeline). Thus the term "costs," as used in the Act of 1813, was not construed to provide for attorney's fees. In 1853, Congress essentially re-enacted the 1813 statute regarding costs, thereby continuing adherence to the American Rule. "Congress returned to the problems of the federal courts in 1853 when it approved a comprehensive measure setting the fees and costs for all federal actions." *Roadway Express*, 447 U.S. at 759 (citing Act of Feb. 26, 1853, 10 Stat. 162). The Act of 1853 remained substantially unchanged and was codified at section 1927, implicitly preserving the American Rule. Thus, the *Roadway Express* decision was a clear indication of the American Rule's shortcomings. These shortcomings led to the 1980 amendment to section 1927.

17. For a discussion of the American Rule on attorney's fees, see Monk v. Roadway Express, Inc., 73 F.R.D. 411 (W.D. La. 1977).

18. Schwarzer, *supra* note 9, at 182 (emphasis added).

19. 28 U.S.C. § 1927 (1980).

20. *See* Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1166 (7th Cir. 1983); *see also* Indianapolis Colts v. Mayor & City Council of Baltimore, 775 F.2d 177, 182 (7th Cir. 1985) (attorney's fees under section 1927 will not be awarded without a showing of subjective bad faith).

21. Schwarzer, *supra* note 9, at 182 (emphasis added).

1983, Rule 11[22] provided "for the striking of a pleading found to lack good ground to support it or to have been interposed for delay."[23] This remedy, however, proved to be an ineffective deterrent to abusive litigation.[24] The pre-1983 version of Rule 11 failed due to numerous factors ranging from confusion over application of the rule to judicial reluctance to impose sanctions.[25] For example, the Rule 11 certification requirement merely indicated that the signing attorney had read the pleadings.[26] There was no bar to the practice of waiting until after the complaint was filed to ascertain whether a valid factual and/or legal basis for the complaint existed. If objections were raised, then the attorney would amend the pleadings to comply with the actual

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22. The following is the text of Rule 11. Strike-throughs represent language deleted by the 1983 amendment, whereas the italicized portions represent the 1983 additions.

RULE 11. SIGNING OF PLEADINGS, *Motions, and Other Papers; Sanctions*

Every pleading, *motion, and other paper* of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, *motion, or other paper* and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney *or party* constitutes a certificate by him that he has read the pleading, *motion, or other paper;* that to the best of his knowledge, information, and belief ~~there is good ground to support it, and that it is not interposed for delay~~ *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.* If a pleading, *motion, or other paper* is not signed, *it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.* ~~or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.~~ *If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*

Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 196-97 (1983) [hereinafter cited as AMENDMENTS].

23. Schwarzer, *supra* note 9, at 181.

24. FED. R. CIV. P. 11 advisory committee note.

25. "There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions." *Id.* (citing R. RODES, K. RIPPLE & C. MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 64-65 (1981)).

26. AMENDMENTS, *supra* note 22, at 196.

legal requisites. The pleadings stage of the litigation could resemble a tennis match—pleadings and amended pleadings would go back and forth between the parties. Such practices were costly to both the court and the parties.[27] Moreover, the "file now, ask questions later" approach caused extensive delays in processing claims—a result clearly contrary to one of the underlying premises of the Federal Rules of Civil Procedure.[28] Finally, the party, not counsel, bore the financial burden of an award of attorney's fees.[29] In sum, the judicial (Rule 11) and the legislative (section 1927) mechanisms for curtailing abusive pleadings and motions fell far short of attaining the intended result.[30]

As amended, Rule 11 *mandates* awarding fees to deal with the problem of judicial reluctance to impose sanctions.[31] The amendment also seems to make the standard for application of Rule 11 more workable because sanctions are mandatory if an attorney fails to do *some* preliminary research. It also attempts to remedy the problem of meeting the previous subjective bad faith standard by changing the inquiry to one of "reasonableness under the circumstances."[32] The amended rule should therefore deter more than just blatant abuse of process. It requires attorneys to conduct some preliminary research[33] and "should eliminate any doubt as to the propriety of assessing sanctions against the attorney."[34]

The amended rule also resolves another preamendment shortcoming, the inability of the court to effectively hold parties who are acting pro se accountable for their actions,[35] by broadening the certifi-

27. *See In re* TCI Ltd., 767 F.2d 441, 447 (7th Cir. 1985); *see also* FED. R. CIV. P. 11 advisory committee note (explaining that the new rule avoids the excessive costs imposed on the system, "streamline[s] the litigation process," and reduces *some* of the detrimental effects of abuse by requiring "some prefiling inquiry into both the facts and the law").

28. Rule 1 mandates that the Federal Rules of Civil Procedure "shall be construed to secure a just, *speedy*, and *inexpensive* determination." FED. R. CIV. P. 1 (emphasis added).

29. *See* AMENDMENTS, *supra* note 22, at 196.

30. FED R. CIV. P. 11 advisory committee note (citing 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1334 (1971)).

31. "If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative *shall* impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . ." FED. R. CIV. P. 11 (emphasis added).

32. "The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances." FED. R. CIV. P. 11 advisory committee note.

33. *Id.*

34. *See supra* note 30.

35. "The signature of an *attorney* constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." FED. R. CIV. P. 11 (pre-amendment) (emphasis added).

cation requirements.[36] Prior to amendment, Rule 11 did not expressly require a pro se litigant to certify pleadings. Thus, such a litigant could avoid the affirmative duties that certification creates. The amended rule, however, is not insensitive to the special situation of pro se litigants.[37]

Some critics contend that the new rule has the capacity to chill attorneys' zeal[38] in representing the interests of their clients and, concomittantly, to discourage attorney creativity.[39] Another criticism is that the amendment has the potential for fostering satellite litigation[40] in an already overburdened system.[41] Moreover, it has been suggested that sanctions are

> counter productive because they are bound to create ill-will among attorneys and between the judge and attorneys. Collateral sanction motions will make it more difficult to handle a case because [in addition to the extra time involved] lawyers will be mad at each other. Furthermore, the judge's ability to arbitrate will be adversely affected.[42]

Underlying most of the criticisms is an inherent concern with the potential of the amended rule to undermine the ideal adversarial model. Rule 11 does not stand alone, however, and must be viewed as a component of a broader systematic change providing for increased judicial management. Thus, much of the criticism surrounding the 1983 amendments to the Federal Rules of Civil Procedure, specifically Rules 11, 16, and 26, represents protectionism of the ideal adversarial paradigm.[43] Strict adherence to this paradigm precluded the judge from taking an active role in the litigation. The current rules, however, mandate an expanded role for the judiciary. "In short, the notion that judges should leave cases to the lawyers has been compromised substantially by the widespread frustration with the present sit-

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36. "The signature of an attorney *or party* constitutes a certificate by him. . . ." FED. R. CIV. P. 11 (as amended Apr. 20, 1983) (emphasis added).

37. "Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations." FED. R. CIV. P. 11 advisory committee note.

38. Schwarzer, *supra* note 9, at 184.

39. *Id.*

40. Judge Schwarzer defined satellite litigation as "ancillary proceedings that may themselves assume the dimensions of litigation with a life of its own." *Id.* at 183.

41. *Id.* For a detailed analysis of federal court overload, see R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-93 (1985).

42. Weinstein, *Reflections on 1983 Amendments to U.S. Rules of Civil Procedure*, N.Y.L.J., Nov. 14, 1983, at 1, col. 3 & 4, col. 1.

43. For a discussion of the "adversary/advocacy" model, see Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

uation and the resulting recognition of the need for effective management."[44]

This comment will describe the conditions which led to the amendment of Rule 11. The authors will discuss pre-passage criticisms of the amendment and analyze compromises reflected in the changes. They will also discuss the standards promulgated under the amended rule, including those germane to pro se litigants, and explore whether such standards are reflective of the intent of the rule. Finally, the authors will analyze anticipated and actual problems of the rule in practice, and comment on the validity of criticisms and the efficacy of the rule itself.

The authors have found, for the most part, that courts have applied the Rule in a manner consistent with the intent of the amendment. The reluctance to impose sanctions has been assuaged, and courts are now imposing sanctions where appropriate. Although it is too soon to determine whether the underlying goal of deterring abusive litigation will be achieved, it seems that continued enforcement of Rule 11's mandate is conducive to such a result.

II. ATTACKING THE CLIMBING COST OF LITIGATION THROUGH THE FEDERAL RULES OF CIVIL PROCEDURE: RULE 11

A. *Rising Litigation Costs*

The cost of litigation has become a matter of serious concern.[45] The magnitude of the problem prompted one informed observer to exclaim, "the cost of litigation has risen so high that it seems that not even the rich can any longer afford to litigate."[46] The causes for the sharp increase in these costs are as numerous and varied as the number and types of attorneys practicing before the bench.[47] One cause, and the focus of this comment, is abuse of the system. One approach to resolution of the crisis in litigation costs has been reform

44. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 20 (1984). Thus, where attorneys do not cooperate, judges now have sanction power to enforce the rules. It must be noted, however, that this may serve to reinforce the adversarial model in that attorneys will move for sanctions where their counterparts fail to litigate accordingly.

45. *See generally* Levin, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 222-36 (1985) (providing statistical analysis of the cost and volume of litigation).

46. Feirich, *Delays and the High Cost of Litigation: Some Thoughts About Alternatives*, 70 ILL. B.J. 738 (1982).

47. In his introduction to a symposium addressing the costs of litigation, the Chief Justice welcomed discussion on "discovery limits, court-annexed arbitration, case management, sanctions, alternative dispute resolution, settlement promotion, and attorneys' fee regulation," as means to resolve the problems associated with litigation costs. *Symposium: Reducing The Costs of Civil Litigation*, 37 RUTGERS L. REV. 217 (1985).

of the very system itself.[48]

The 1980 amendments to the Federal Rules of Civil Procedure attempted to provide a solution to the problems of abusive litigation, and the adverse economic impact such abusive practices have on the judicial system.[49] Justice Powell criticized these amendments as ineffective, a compromise, and a simplistic solution to a difficult problem.[50] Dissenting from the Supreme Court's order amending the rules, he stated, "Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms."[51] Justice Powell's concerns did not go unanswered. Within months of the effective date of the 1980 amendments, the advisory committee recognized that the 1980 amendments did not go far enough.[52] Thus, the committee designed the 1983 amendments to remedy the shortcomings Justice Powell foresaw.[53]

B. *The Status of Rule 11 Before 1983*

Rule 11 has always provided for attorneys' certification of pleadings. The underlying premise was that by affixing his signature, an attorney certified that he had read the pleadings. Certification carried the presumption that the signing attorney attested to the legal and

48. *See generally Symposium, supra* note 5, at 218; Underwood, *Curbing Litigation Abuses: Judicial Control of Adversary Ethics-The Model Rules of Professional Conduct and Proposed Amendments to the Rules of Civil Procedure,* 56 ST. JOHN'S L. REV. 625 (1982); Comment, *Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain?,* 15 TEX. TECH L. REV. 887 (1984); Comment, *Deterring Dilatory Tactics in Litigation: Proposed Amendments to Rules 7 and 11 of the Federal Rules of Civil Procedure,* 26 ST. LOUIS U.L.J. 895 (1982). Reform through the Federal Rules of Civil Procedure, however, is not without opposition. *See* Parness, *Groundless Pleadings and Certifying Attorneys in the Federal Courts,* 1985 UTAH L. REV. 325, 325-26 n.1 (suggesting that the "nostalgic search for uniform enforceable standards of high-quality performance" is detrimental to consumers of legal services) (quoting Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective,* 1983 WIS. L. REV. 639, 655, 687); *see also* Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power,* 11 HOFSTRA L. REV. 997 (1983) (suggesting that reform through the Federal Rules may be an abuse of power).

49. *See, e.g.*, FED. R. CIV. P. 26(f) (providing for court assistance in effectuating a discovery conference); FED. R. CIV. P. 37(g) (authorizing attorney's fees for failure to participate in good faith in the framing of a discovery plan). *See also infra* notes 133-38 and accompanying text.

50. 446 U.S. 997, 997 (1980) (Powell, J., dissenting).

51. *Id.* at 1000.

52. For a discussion of the chronological sequence of events related to the adoption of the 1980 amendments and the evolution of the 1983 amendments, see Comment, *Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain?*, 15 TEX. TECH L. REV. 887, 887-91 (1984).

53. FED. R. CIV. P 11 advisory committee note (citing 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1334 (1982)).

factual propriety of the information contained in the pleading. In practice, however, the preamendment rule failed to achieve its purpose for numerous reasons.

Primarily, the courts were confused over how sanctions should be applied. The confusion partially centered on determining what circumstances should trigger the imposition of sanctions.[54] Furthermore, the rule did not mandate the imposition of sanctions, and courts exhibited a reluctance to impose sanctions.[55] Due to the subjective nature of that standard, courts could impose sanctions in only the most blatant instances of abuse.[56] In addition, clients, rather than counsel, ultimately paid court-imposed sanctions for abusive pleading. One comprehensive study found only two cases where the offending attorneys actually bore the burden of the sanctions.[57] Thus, the rule failed to deter attorneys from abusive practices because it did not hold them directly accountable for their actions.

Finally, the certification requirement was nugatory because the attorney's signature did not mean what the rule intended: "There is good ground to support [the pleading]; and that it is not interposed for delay."[58] The requisite standard was one of willfulness and bad faith. A belief that there was good ground to support a pleading was merely that, a belief. This belief, however, was seldom based on legal research or on an in-depth examination of the facts, but was based merely on the subjective belief of the certifying attorney. Without any prefiling inquiry, attorneys often amended poor pleadings. Such a system was bound to create the delay the rule expressly militated against.

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54. *Id.*

55. *Id.* The Committee worded the duty to impose sanctions such that the "attorney *may* [have been] subjected to *appropriate* disciplinary action." AMENDMENTS, *supra* note 22, at 197 (emphasis added). Thus, the Rule did not create an affirmative duty to impose sanctions, and gave the courts wide latitude, with little direction, as to what sanctions would be appropriate.

56. R. RODES, K. RIPPLE & C. MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 64 (1981). The court had the power to strike any pleading unsupported in fact or law. For example, "a palpably false allegation or one that can be shown to be false by consulting an easily accessible public record . . . [a] plaintiff . . . [with] no capacity to sue; [or] when it appears that counsel initiated the suit on a rumor and intends to use discovery to find how good a case he has." *Id.* at 64-65 (footnotes omitted). Nevertheless, even in such cases the court should allow the party to amend the pleading by deleting or qualifying the offending allegations. *Id.*

57. *Id.* at 65 n.426 (citing American Automobile Ass'n v. Rothman, 104 F. Supp. 655 (E.D.N.Y. 1952); *In re* Lavine, 126 F. Supp. 39 (S.D.Cal.), *rev'd sub nom. In re* Los Angeles County Pioneer Soc'y, 217 F.2d 190 (9th Cir. 1954)).

58. *See supra* note 22.

III. RULE 11 AFTER 1983

Amended Rule 11[59] directly reflects the concerns addressed thus far. It is an attempt to hold attorneys personally accountable for their pleadings. Moreover, the amendments expressly broadened the scope of the rule so as to encompass all motions and papers. The rule also attempts to define the circumstances that should trigger the imposition of sanctions. Additionally, Rule 11 places an affirmative duty on judges so they will not be reluctant to order sanctions. Finally, the rule has been designed to deal more effectively with litigants appearing pro se.

A. *Attorney Accountability*

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.[60]

Amended Rule 11 goes beyond the previous rule's requirement of merely reading the pleading.[61] An attorney is now required to do preliminary research into the state of the law *prior* to filing the pleading. In addition, the amended rule calls for a greater familiarity with the facts so as to ascertain whether the pleadings are well-grounded in fact. Thus, Rule 11 "place[s] an affirmative duty on an attorney to conduct a reasonable inquiry into the legal and factual bases for the law suit."[62] Attorney conduct is no longer measured on a subjective basis.[63] The Rule now requires that an attorney's inquiry into the facts and law be reasonable under the circumstances. Thus, by imposing an objective standard of reasonableness, there is greater determinacy regarding actions of an attorney.

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59. *Id.*

60. FED. R. CIV. P. 11.

61. *See supra* note 22.

62. Stevens v. Lawyers Mut. Liab. Ins. Co., 107 F.R.D. 112, 114 (E.D.N.C. 1985) (citing Zaldivar v. City of Los Angeles, 590 F. Supp. 852, 856 n.1 (C.D. Cal. 1984), *rev'd*, 780 F.2d 823 (9th Cir. 1986)).

63. "The court notes at the outset of this discussion on sanctions that it can find a violation of Rule 11 without finding that counsel acted in bad faith. Neither the 'reasonable inquiry' or 'improper purpose' clauses of the Rule encompass a subjective test of bad faith." *Id.* at 113.

1. THE CIRCUIT COURTS: BLAZING THE TRAIL

In *Eastway Construction Corp. v. City of New York*,[64] the Court of Appeals for the Second Circuit reversed a trial court's denial of a motion to assess attorney's fees against a plaintiff for filing a frivolous action.[65] *Eastway* was the first circuit court decision to address the issue of awarding attorney's fees under amended Rule 11. The plaintiff alleged antitrust and civil rights violations against the defendant.[66] The trial court granted the defendant's motion for summary judgment, but denied his motion for attorney's fees.[67] During a hearing on the motions, the trial judge stated: "No, you are not going to get attorneys' fees in this case. I can't say that this was a frivolous case."[68] The plaintiff appealed the summary judgment and the defendant filed a cross-appeal of the trial court's denial of the motion for attorney's fees. In reversing the trial court's denial of the motion for attorneys' fees, the Second Circuit held that, although the plaintiff's actions did not constitute subjective bad faith, "a competent attorney, after reasonable inquiry, would have had to reach the . . . conclusion . . . that [a] claim of an antitrust violation by non-competitors, without any allegation of an antitrust injury, was destined to fail."[69] The court clearly adhered to the Rule 11 mandate that a complaint must be well-grounded in law. Moreover, the court applied the reasonableness standard in analyzing the issue before it, stating:

> [W]e hold that a showing of subjective bad faith is no longer required to trigger the sanctions imposed by the rule. Rather, sanctions shall be imposed against an attorney and/or his client when it appears that a pleading has been interposed for any improper purpose, *or where*, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is not well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.[70]

Eastway marked the beginning of judicial implementation of the standards prescribed under Rule 11. Other circuit courts have been quick to follow the Second Circuit's lead. In *Indianapolis Colts v. Mayor and City Counsel of Baltimore*,[71] the Court of Appeals for the

64. 762 F.2d 243 (2d Cir. 1985).
65. *Id.* at 246.
66. *Id.* at 248.
67. *Id.* at 248-49.
68. *Id.* at 249. It is interesting to note that the district court judge in *Eastway* was an ardent critic of the 1983 amendment to Rule 11. *See supra* note 42 and accompanying text.
69. *Eastway*, 762 F.2d at 254.
70. *Id.* at 253-54 (footnote omitted).
71. 775 F.2d 177 (7th Cir. 1985).

Seventh Circuit determined there was no factual basis for the plaintiff's interpleader action. On remand, the defendant moved for attorney's fees. The district court denied the motion, and the Seventh Circuit affirmed on the basis that the interpleader claim was not frivolous. The court noted that two judges, one at the district court level and another at the circuit court level, believed that an interpleader action would lie.[72] The circuit court, therefore, held that an award of attorney's fees was not warranted. Furthermore, because "a competent attorney reasonably should have recognized [that the motion for attorney's fees and the appeal of the district court's denial thereof] had no chance of success," the circuit court required the *appellant* to pay the *appellee* reasonable attorney's fees and costs of defending the appeal.[73]

In *In re TCI Ltd.*,[74] the court awarded attorney's fees against a debtor's attorney for repeatedly amending a pleading that was not well-grounded in law. The attorney attempted to establish the status of a building and fixtures as personalty. The law, however, is well-settled that a building is realty, not personalty. The debtor's attorney amended his complaint several times, each time returning with greatly expanded pleadings that, in essence, repeated the meritless claim. The court held that "a complaint must be 'warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.' If a competent attorney would find no basis for a legal argument, then it [is not improper] to penalize the repetitious assertion of that argument."[75]

Certain common elements run through the cases that apply amended Rule 11. Primarily, the courts have heeded the advisory committee's intent to adopt an objective standard. The *Eastway*, *Indianapolis*, and *TCI* courts held that Rule 11 does not require a finding of subjective bad faith. The courts have consistently analyzed whether the allegedly offending attorney's actions were reasonable under the circumstances of the particular case. In arriving at this determination,

72. *Id.* at 181-82.

73. *Id.* at 184. This decision should serve as a warning to practitioners that motions for Rule 11 sanctions will not become the newest abusive litigation tactic. A motion for sanctions under Rule 11 must itself conform to the Rule's admonition that pleadings, motions and other papers be well-grounded in fact and law. The decision in *Indianapolis Colts* seems to answer the preamendment concern that adversaries would abuse this new opportunity and add to the problems plaguing the litigation process. It should also be noted that the Federal Rules of Appellate Procedure provide a remedy for frivolous appeals, further safeguarding against abuse of the amended Rule (at the appellate level). *See* FED. R. APP. P. 38 (providing for damages and single or double costs to appellee).

74. 769 F.2d 441 (7th Cir. 1985).

75. *Id.* at 447.

the courts have exercised great care "to avoid the wisdom of hindsight in determining whether a pleading was valid when signed . . . ."[76] Analysis of "reasonableness under the circumstances" entails an examination of whether the pleadings are based on fact and/or whether "existing law or a good faith argument for the extension, modification, or reversal of existing law"[77] supports the pleadings.

2. THE DISTRICT COURTS: THE RULE IN PRACTICE

This Comment has, thus far, described judicial interpretation of Rule 11 on the appellate level. As in the game of football, however, it is in the trenches of play that games are won or lost. Thus, it is in the trial courts that application of the Rule's provisions is of most practical import. Generally, district court adjudication has been consistent with the circuit courts' analysis. In other words, trial courts have consistently required that pleadings be well-grounded in fact[78] and law.[79]

In *City of Yonkers v. Otis Elevator Co.*,[80] the district court ordered the plaintiffs to pay attorney's fees to the defendant for asserting a fraud claim with no factual basis. The plaintiffs argued that imposition of Rule 11 sanctions was improper because they were entitled to engage in discovery to ascertain whether there was a factual predicate for the fraud claim. In response, the court stated: "Rule 11 is designed to insure that allegations made [against] a member of the bar of this Court are supported by a sufficient factual predicate *at the time that the claims are asserted.*"[81] Without making a hindsight

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76. *Eastway*, 762 F.2d at 254.

77. Schwarzer, *supra* note 9, at 189.

78. *See infra* text accompanying notes 76-83; *see also* Weil v. Markowitz, 108 F.R.D. 113, 115-16 (D.D.C. 1985) (addressing the capacity to impose sanctions for filing a complaint lacking adequate factual grounds); Smith v. Egger, 108 F.R.D. 44, 45 (E.D. Cal. 1985) (awarding fees to defendant IRS officials for plaintiff's frivolous pleading).

79. *See generally* Passalacqua Builders, Inc. v. Resnick Developers South, Inc., 611 F. Supp. 281 (S.D.N.Y. 1985). In *Passalacqua*, costs and reasonable attorney's fees were awarded to plaintiffs for expenses incurred in responding to defendants' motion to dismiss. Plaintiffs brought an action to enforce a judgment against the defendants. The defendants had previously filed a motion for rehearing on the court's judgment that plaintiffs were seeking to enforce. Thus, the defendants' subsequent motion to dismiss the enforcement action was no more than an attempt to relitigate the issues raised in their motion for rehearing. Hence, the court held:

> [T]here was no need to file the additional motion to preserve any defenses because they were part of the record in the motion for reargument. The motion to dismiss is clearly the type of abuse of motion practice that Rule 11 of the Federal Rules of Civil Procedure was intended to discourage. Therefore, as a sanction against Defendants pursuant to Rule 11, the court awards plaintiffs the reasonable costs and attorneys' fees incurred in responding to Defendants' motion to dismiss.

Id. at 285.

80. 106 F.R.D. 524, 525-26 (S.D.N.Y. 1985).

81. *Id.* at 525.

determination, the court granted the defendant's motion for attorney's fees because no factual predicate existed *at the time* the claim was asserted.

The district court's decision in *Duncan v. WJLA-TV, Inc.*[82] provides another good example of a case where an award of attorney's fees was merited because the claim lacked a sufficient factual basis. In *Duncan*, the plaintiff designated an individual as an expert witness prior to trial. The witness, however, never agreed to testify as an expert. Plaintiff's attorney filed a praecipe substituting the first expert with another, and then filed a pretrial brief to qualify the second individual as an expert. The brief alleged that the individual held a bachelor of arts degree in media studies from Emerson College. At trial, however, a voir dire examination revealed that the alleged expert did not have the stated credentials, nor had he ever indicated otherwise to plaintiff's counsel.[83] The defendant moved for attorney's fees and costs incurred in opposing the plaintiff's purported experts.[84] After a hearing, the court held "that the requirements of Rule 11 placed a presignature obligation on plaintiff and her attorney to conduct a reasonable inquiry into the qualifications of their expert before filing a pleading containing erroneous information."[85] The plaintiff's attorney clearly did not conduct the requisite prefiling inquiry into the purported expert's credentials. The court went on to state,

> [t]he requirements of Rule 11 apply to *any* paper the lawyer signs. The August 1983 amendment to Rule 11 includes the words "formed after reasonable inquiry." As the Advisory Committee Note suggests, "formed after reasonable inquiry" imposes a *stop-and-think* obligation on the lawyer. There is now a mandated obligation on the part of the attorney to stop and think about the pleading and to certify that the information contained in the paper is well-grounded in fact and warranted by existing law "to the best of his knowledge, information, and belief formed after reasonable inquiry." What constitutes "reasonable inquiry" depends on the circumstances of the case.[86]

Because the witness was designated as plaintiff's expert, "his academic record was a critical aspect of his qualifications and should have been the subject of early discussions with plaintiff and her counsel with respect to his testimony. Nevertheless, . . . plaintiff and her counsel never inquired whether he had even graduated from

82. 106 F.R.D. 4 (D.D.C. 1984).
83. *Id.* at 6.
84. *Id.* at 5.
85. *Id.* at 6.
86. *Id.* at 5-6 (emphasis added).

college."[87]

A clear example of an attorney's failure to satisfy the "stop-and-think" obligation imposed by Rule 11 is *Johnson v. Veterans Administration*.[88] In *Johnson*, the plaintiff filed a claim for disability benefits with the Veterans Administration. After his claim was denied, the plaintiff filed suit in district court against the Veterans Administration and the "Board of Federal Appeals." The defendant moved to dismiss the complaint for lack of subject matter jurisdiction and moved for an award of attorney's fees.[89] In granting the defendant's motions, the district court held that it clearly did not have subject matter jurisdiction: "It is beyond peradventure that the courts are without jurisdiction to review decisions of the Veterans Administration denying veterans benefits or compensation."[90] The court based its decision on the authority of 38 U.S.C. § 211(a)[91] and case law,[92] which explicitly deprive the courts of jurisdiction to entertain such claims. In support of its award of attorney's fees, the court reasoned that a prefiling "reasonable inquiry" into the law would have revealed this well-settled legal doctrine. Interestingly, the court also expressed concern over the fact that one of the named defendants, the Board of Federal Appeals, was apparently a nonexistent entity.[93] This "blatant error" further reinforced the judge's determination that the plaintiff had not made a reasonable prefiling inquiry.

The above examples are not meant to suggest that the requirements for sufficient legal and factual grounds are mutually exclusive. As a matter of fact, the legal and factual requirements are usually mutually dependent. As we have seen, this has led to the imposition of sanctions upon attorneys.

B. *Rule 11 and Pro Se Litigants*

One of the shortcomings of preamendment Rule 11 was the inability to deter abusive practices by pro se litigants. In fact, prior to

87. *Id.* at 6.

88. 107 F.R.D. 626 (N.D. Miss. 1985).

89. *Id.* at 627-28.

90. *Id.* (citations omitted).

91. 38 U.S.C. § 211(a) provides in pertinent part:

> The decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court . . . shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C. § 211(a) (1983).

92. *See* Barry v. United States, 527 F. Supp. 472, 475 (D.S.C. 1981); Cox v. Veterans Admin., 470 F. Supp. 1208, 1209 (N.D. Tex. 1979).

93. *Johnson*, 107 F.R.D. at 628.

amendment, Rule 11 contained a loophole for pro se litigants.[94] The Rule's language, although requiring a party to sign a pleading, failed to attach any significance to the signature of a nonattorney. Consequently, Rule 11 did not hold the pro se litigant accountable for the quality of the pleading. The amended rule provides that the signature of any "attorney *or party* constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and . . . law . . . ."[95] Thus, the certification provision is now wholly applicable to both attorneys and pro se litigants.

To address the pro se issue, we now return to our friend Joseph Di Silvestro.[96] As a prefatory matter, it is important to point out that *Di Silvestro* is not the typical case but represents, rather, the "worst case scenario." Nevertheless, an examination of Di Silvestro's litigious history[97] reveals that he would have been subject to the imposi-

94. *See supra* note 35 and accompanying text.

95. FED. R. CIV. P. 11 (emphasis added).

96. Di Silvestro v. United States, 767 F.2d 30 (2d Cir. 1985).

97. At this point it may be helpful to list some of Di Silvestro's travails to fully comprehend the magnitude of his abuse of the system. Di Silvestro v. United States, No. CV 83-0895 (E.D.N.Y. Aug. 13, 1983) (Mishler, J.), *aff'd mem.*, 742 F.2d 1436 (2d Cir. 1984); motion to proceed in forma pauperis, No. 81-6247 (2d Cir. Jan. 6, 1982), *cert. denied*, 454 U.S. 1156 (1982), *motion to reopen denied* (E.D.N.Y. Mar. 4, 1982) (Mishler, J.), *aff'd mem.*, 697 F.2d 289 (2d Cir. 1982), *cert. denied*, 459 U.S. 1177, *reh'g denied*, 460 U.S. 1017 (1983); Di Silvestro v. United States, No. 79 C 1931 (E.D.N.Y. Apr. 11, 1980) (Mishler, C.J.), *aff'd mem.*, 633 F.2d 203 (2d Cir.), *cert. denied*, 449 U.S. 903, *reh'g denied*, 449 U.S. 1028 (1980), *motion to extend time for appeal denied*, No. 79 C 1931 (E.D.N.Y. Oct. 23, 1981) (Mishler, C.J.); Di Silvestro v. United States, No. 78 C 1525 (E.D.N.Y. 1978) (Mishler, C.J.), *aff'd mem.*, (2d Cir.), *cert. denied*, 441 U.S. 936, *reh'g denied*, 442 U.S. 924 (1979); Di Silvestro v. Veterans Admin., No. 76 C 1167 (E.D.N.Y. 1976) (Mishler, C.J.), *aff'd mem.*, 556 F.2d 555 (2d Cir.), *cert. denied*, 434 U.S. 840, *reh'g denied*, 434 U.S. 960 (1977); Di Silvestro v. United States, 268 F. Supp. 516 (E.D.N.Y. 1966) (Mishler, J.), *rev'd and remanded*, 405 F.2d 150 (2d Cir. 1968); Di Silvestro v. United States, 181 F. Supp. 860 (E.D.N.Y.), *aff'd mem.*, (2d Cir.), *cert. denied*, 364 U.S. 825, *leave to file second petition for rehearing denied*, 364 U.S. 897 (1960); Di Silvestro v. Veterans Admin., 151 F. Supp. 337 (E.D.N.Y. 1957), *application to proceed in forma pauperis denied mem.*, No. 17322 (2d Cir.), *cert. denied*, 355 U.S. 935, *reh'g denied*, 355 U.S. 968 (1958); Di Silvestro v. Veterans Admin., 132 F. Supp. 692 (E.D.N.Y. 1955), *aff'd*, 228 F.2d 516 (2d Cir.) (per curiam), *cert. denied*, 350 U.S. 1009, *reh'g denied*, 351 U.S. 928 (1956). For related claims, see Di Silvestro v. Gray, 194 F.2d 355 (D.C. Cir.) (per curiam), *cert. denied*, 343 U.S. 930, *reh'g denied*, 343 U.S. 952 (1952); Di Silvestro v. Veterans Admin., 81 F. Supp. 844 (E.D.N.Y.), *aff'd*, 173 F.2d 933 (2d Cir.), *motion to vacate order dismissing complaint denied*, 9 F.R.D. 435 (E.D.N.Y. 1949), *amended complaint dismissed*, 10 F.R.D. 20 (E.D.N.Y.), *aff'd*, 181 F.2d 502 (2d Cir.) (per curiam), *cert. denied*, 339 U.S. 989 (1950).

The costs in terms of man-hours, dollars, and other judicial resources, not to mention the frustration the judges suffered, as well as litigants who were denied prompt access to the federal courts because of Mr. Di Silvestro's follies, cannot be calculated. Nonetheless, abuse inherent in the length of the preceding list is self-evident. One should note that although Di

tion of attorney's fees had the current rule been in effect two decades ago. Di Silvestro began his lengthy series of lawsuits in 1949.[98] He initially filed an action against the Veterans Administration seeking reinstatement, back pay, and disability benefits. In that case, the court granted the defendant's motion for summary judgment.[99] Di Silvestro then appealed to the Court of Appeals for the Second Circuit,[100] but to no avail. For over thirty years, Di Silvestro continued to press his baseless claims.[101] In 1983, when the court dismissed Di Silvestro's then pending claim, it permanently enjoined him from bringing any further lawsuits related to the claim first brought in 1949.[102] Di Silvestro failed to heed the court's injunction, however, and instead brought another suit in the same court, before the same judge, and on the same grounds. The court dismissed that action on grounds of res judicata, and finally, the court awarded attorney's fees against Di Silvestro.[103] The Second Circuit affirmed.[104]

The facts of *Di Silvestro* clearly merited the imposition of sanctions. One does not need a legal education to realize that filing and refiling a plethora of suits and appeals all based on the same facts, and each, as the one before it, without merit, is an abuse of the legal system. The new language of the Rule, however, does not require such overwhelming abuse of the system to trigger the sanctions provision. "Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in pro se situations."[105]

Silvestro has long been guilty of frivolous litigation, it was not until 1985 that the court imposed sanctions pursuant to Rule 11.

Di Silvestro, of course, is not the only pro se litigant ever to abuse the system. In Wood v. Santa Barbara Chamber of Commerce, Inc., a pro se plaintiff litigated and relitigated a simple employment dispute over a ten year period. 705 F.2d 1515 (9th Cir. 1983). During that time, Wood joined over 250 defendants, and at one point, involved over 30 district courts. *Id.* at 1525. The district court ultimately enjoined Wood, like Di Silvestro, from bringing further actions based on his claim, and the Court of Appeals for the Ninth Circuit affirmed the injunction. *Id.* The court did not award attorney's fees, however, because the defendants never requested fees. Perhaps in light of amended Rule 11, courts will now feel compelled to award attorney's fees sua sponte under similar circumstances. *See, e.g.*, Cook v. Peter Kiewit Sons Co., 775 F.2d 1030 (9th Cir. 1985) (affirming award of attorney's fees against pro se plaintiff for abusive litigation).

98. Di Silvestro v. Veterans Admin., 81 F. Supp. 844 (E.D.N.Y. 1949).

99. *Id.* at 847.

100. Di Silvestro v. Veterans Admin., 173 F.2d 933 (2d Cir. 1949).

101. *See* Di Silvestro v. United States, 767 F.2d 30 (2d Cir. 1985).

102. *Id.* at 32.

103. *Id.* at 31.

104. *Id.* at 33.

105. FED. R. CIV. P. 11 advisory committee note.

In *Bigalk v. Federal Land Bank Association*,[106] plaintiffs, acting pro se, brought an action alleging various violations of federal and state constitutional and statutory provisions.[107] The dispute arose out of an $85,000 loan from the Federal Land Bank to the plaintiffs in 1977. The loan was secured by a mortgage on approximately 240 acres of farm land which included the plaintiffs' homestead.[108] The plaintiffs' complaint was identical to other form complaints that pro se farmers used in attempting to forestall loan foreclosure proceedings.[109] In granting defendants' motion for summary judgment, the court carefully examined plaintiffs' allegations and considered all possible theories upon which relief could be granted. The court concluded that the only possible valid claim for relief that the plaintiffs had alleged was under the Truth in Lending Act.[110] The Act, however, specifically exempted agricultural loans in excess of $25,000.[111] In addition, the Act established a one year limitation period within which to bring an action. Defendants sought an award of attorney's fees under Rule 11, partly on the ground that plaintiffs did not reasonably inquire into existing law before filing. Despite the plaintiffs' apparent failure to satisfy Rule 11's prefiling standard, the court declined to impose the sanctions. At the hearing, the court quickly pointed out that the plaintiffs had shown their efforts were sincere and had unsuccessfully attempted to obtain counsel.[112]

The court's denial of the motion for sanctions in *Bigalk* is well within the spirit of the amended Rule. It was after they failed to retain legal counsel that the Bigalks proceeded with their claim pro se. Had an attorney acted in a similar manner, sanctions would clearly have been warranted because it was evident that the pertinent federal statutes did not permit such a cause of action. As the Bigalks were not attorneys, the court held that they acted "reasonably under the circumstances." Thus, the court's denial of the motion for attorney's fees was consonant with and indicative of the Advisory Committee's admonition that special care be taken in pro se cases.[113]

IV. JUDICIAL MANAGEMENT—CHANGING THE PARADIGM

The puzzlement is why we . . . tread so gingerly, why we seem so

106. 107 F.R.D. 210 (D. Minn. 1985).
107. *Id.* at 211.
108. *Id.*
109. *Id.*
110. *Id.* at 211-12.
111. *Id.* at 212.
112. *Id.* at 213.
113. *See supra* note 36 and accompanying text.

> apologetic, why we feign indignation but shirk from sanctions when confronted with pleadings which debase the system we strive to perfect. Better that we enlist every practitioner to become a bounty hunter, fit them out with coonskin caps and reward them with triple damages for the hide of every process-abuser they turn in.[114]

The preceding passage indicates frustration with the long-standing tradition of judicial avoidance of involvement in the litigation process.[115] The judiciary, and indeed the legal profession as a whole, have traditionally exercised faithful adherence to the adversarial advocacy paradigm.[116] Many criticisms of the 1983 amendments to the Federal Rules of Civil Procedure arise from this ideological view.[117] Concern has generally centered around the Rule's capacity to chill counsels' zeal in advocating their clients' cases,[118] and its potential to impede and discourage attorney creativity.[119] Moreover, some critics have expressed concern over the possibility of fostering satellite litigation.[120] One critic has suggested that the imposition of sanctions under Rule 11 is counterproductive because it will create ill-will among attorneys as well as between judges and attorneys.[121] Implicit in that criticism is the fear that imposition of sanctions may imperil judicial objectivity, resulting in a bias that could continue throughout the duration of a case.[122] Finally, some commentators have expressed concern over the impropriety of the Rule in view of the Rules Enabling Act.[123]

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114. Parness, *Three Suggestions for Trial Judges Overseeing Certification Standards,* Nat'l L.J., Mar. 3, 1986, at 28, col. 3 (quoting Memorandum on Fee Award and Order at 12, Dayan v. McDonald's Corp., No. N9 70 CH 2258, (Cir. Ct. of Cook County, Ch. Div., Mar. 1, 1983), *aff'd,* 126 Ill. App.3d 11, 466 N.E.2d 945 (1984)). Professor Parness noted that the judge in *Dayan* issued an order awarding $1.8 million in attorney's fees and costs. The award was subsequently affirmed on appeal. *Id.*

115. *See* I.B.M. v. Edelstein, 526 F.2d 37 (2d Cir. 1975) (granting petitioner's motion for writ of mandamus directing Judge Edelstein to withdraw pretrial orders requiring the presence of opposing counsel during preliminary witness interviews because such orders were beyond the parameters of the judge's power).

116. *See generally* Resnick, *Managerial Judges,* 96 HARV. L. REV. 374 (1982); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics,* 1978 WIS. L. REV. 29.

117. *See supra* notes 37-42 and accompanying text.

118. *See infra* note 137.

119. *See* Schwarzer, *supra* note 9, at 184.

120. *Id.* at 183.

121. *See supra* note 45.

122. *See infra* note 148 and accompanying text.

123. *See* Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power,* 11 HOFSTRA L. REV. 997, 1006 (1983); *infra* notes 164-69 and accompanying text.

A. *The Adversary/Advocacy Model*

From the time the Advisory Committee undertook to amend the Federal Rules of Civil Procedure, the critics have been none too silent. Concern has centered on the Rule's potential for creating impediments to the adversary system itself. In other words, some critics view the 1983 amendments as derogating the ideal adversarial paradigm.[124] Professor Simon has identified four principles necessary for the adversary model: neutrality, partisanship, procedural justice, and professionalism. The first two principles, neutrality[125] and partisanship,[126] are principles of conduct. They "describe the basic conduct and attitudes of professional advocacy."[127] The other two principles, procedural justice[128] and professionalism,[129] are "founda-

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124. *See generally* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions,* 64 MICH. L. REV. 1469 (1966); Noonan, *The Purposes of Advocacy and the Limits of Confidentiality,* 64 MICH. L. REV. 1485 (1966).

125. Simon, *supra* note 116, at 36. According to Professor Simon,

> [T]he first principle of conduct is the principle of neutrality. This principle prescribes that the lawyer remain detached from his client's ends. The lawyer is expected to represent people who seek his help regardless of his opinion of the justice of their ends. In some cases, he may have a duty to do so; in others, he may have the personal privilege to refuse. But whenever he takes a case, he is not considered responsible for his client's purposes. Even if the lawyer happens to share these purposes, he must maintain his distance. In a judicial proceeding, for instance, he may not express his personal belief in the justice of his client's cause.

Id. (footnotes omitted).

126. Professor Simon continues:

> The second principle of conduct is partisanship. This principle prescribes that the lawyer work aggressively to advance his client's ends. These means may involve deception, obfuscation, or delay. Unlike the principle of neutrality, the principle of partisanship is qualified. A line separates the methods which a lawyer should be willing to use on behalf of his client from those he should not use. Before the lawyer crosses the line, he calls himself a representative; after he crosses it, he calls himself an officer of the Court. . . . [H]e should not hesitate to plead his client not guilty even when he knows the client has committed the crime with which he is charged, and . . . he should invoke the statutes of fraud and limitations to defeat otherwise valid civil claims.

Id. at 36-37 (footnotes omitted).

127. *Id.* at 37.

128. *Id.* at 38.

> In its most general usage, procedural justice holds that the legitimacy of a situation may reside in the way it was produced rather than its intrinsic properties. Another aspect of the principle is that, given adequate procedures, one can act justly by conforming to them regardless of the consequences to which one's conduct contributes. . . . [T]he nature of the consequences to which the lawyer's actions may lead is irrelevant to the ethical decisions he must make. . . . [T]he lawyer must stay within the boundaries of his role regardless of whether doing so will promote the discovery of truth. . . . [T]he goal of truth legitimates the entire system of procedures and informs its design, but it does not determine specific ethical decisions. Such decisions are determined by procedural requirements.

tion principles which have to do with the way the principles of conduct are derived and applied."[130] These principles—neutrality, partisanship, procedural justice, and professionalism—combine to form the ideology of advocacy.

Another important component of the adversarial paradigm is the notion that judges should remain disinterested in the proceedings before them. Professor Resnick stated that "[p]arties, rather than officers of the state, controlled case preparation. The factfinder, whether jury or judge, received evidence by listening relatively passively to the evidence chosen and the witnesses rehearsed by the parties."[131] Reflecting these paradigmatic concerns, the Rules have traditionally kept the judge removed from the proceedings as much as practically possible.

In essence, the paradigm requires the system be left to operate with the least possible intrusion from the bench. There should be no impediments to the adversarial nature of professional advocacy. Each actor should be left to judge his own actions, and there is a deep respect for the attorney's right to do all that is possible in pursuit of his client's ends. The adversary/advocacy proponent believes that the

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Id. (footnote omitted).

129. Simon defined "professionalism" thus:

> In its most general usage, the term professionalism refers to the notion that social responsibility for development and application of certain apolitical and specialized disciplines should be delegated to the practitioners of these disciplines.
>
> . . . [T]he notion [is] that the law is an apolitical and specialized discipline and that its proper development and application require that legal ethics be elaborated collectively by lawyers in accordance with criteria derived from their discipline.

Id. (footnote omitted).

130. *Id.* at 36.

131. Resnick, *supra* note 116, at 381. Professor Resnick provides an example of the judicial aspect of the adversarial model at work:

> Until recently, federal judges rarely paid much attention to the filing of lawsuits. Complaints were "file stamped" by court clerks, plaintiffs' checks were credited to the United States, and marshals were dispatched to serve process on defendants. Once served, defendants were supposed to answer or seek dismissal within twenty days. The time limit was an artifice, however, because parties commonly stipulated to extend the deadline; months would pass before a defendant filed a responsive pleading. Once an answer was filed, issue was "joined"; but again, a judge would take no notice. Unless and until one of the parties requested some sort of judicial action (granting a motion for summary judgment, a date for trial, a pretrial conference), most judges did not intervene during the pretrial stage. The parties might undertake discovery, negotiate settlement, or let the case lie dormant for years, all without judicial scrutiny.

Id. at 384.

truth will ultimately emerge if the paradigm is embodied in the procedures that govern the system.

The 1983 amendments to the Federal Rules of Civil Procedure[132] are consistent with a pattern of digression from strict adherence to the adversarial paradigm. The interrelationship between the amendments to Rules 7,[133] 11,[134] 16,[135] and 26(g),[136] has a systematic impact. Each of these amendments eroded the established principles underlying the adversarial advocacy paradigm. Hence, criticisms of the amendments arise from a desire to protect the sacred paradigm.

B. *The Criticisms of Amended Rule 11*

A primary criticism of the 1983 amendment to Rule 11 is that it

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132. For a brief overview of the 1983 amendments to the Federal Rules of Civil Procedure, see Comment, *Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain?,* 15 TEX. TECH L. REV. 887 (1984); Hall, *New Rules Amendments are Far Reaching,* 69 A.B.A. J. 1640 (1983); Weinstein, *Reflections on 1983 Amendments to U.S. Rules of Civil Procedure,* N.Y.L.J., Nov. 14, 1983, at 1, col. 3 (criticizing the amendments).

133. FED. R. CIV. P. 7. Rule 7 governs the form of motions. The amended rule provides in pertinent part: "(b) (3) All motions shall be signed in accordance with Rule 11." *Id.* Thus, the Court incorporated the significance of affixing one's signature under Rule 11 in Rule 7. Concommitantly, the duties and responsibilities attendant to certification in Rule 11 are, likewise, expressly mandated in Rule 7.

134. *See supra* note 22.

135. FED. R. CIV. P. 16. Rule 16 is the clearest example of the move away from the judge's role as envisioned by proponents of the adversarial model. *See* Resnick, *supra* notes 116 and 131 and accompanying text. Similar to Rule 11, amended Rule 16(f) permits the court to exercise broad sanctioning power and responsibility. In addition, Rule 16(f) mandates shifting any expenses incurred due to noncompliance with the Rule. The new duties imposed on judges are of particular interest. Judges are now required to take a more active role in pretrial scheduling and planning. FED. R. CIV. P. 16 (b),(c),(d),(e).

136. FED. R. CIV. P. 26(g). Rule 26(g), as amended, provides for sanctions against attorneys and/or parties for abuse of the discovery process. The responsibilities imposed on attorneys under this Rule are identical to those imposed under amended Rule 11. Specifically, a signing party or attorney must:

> read the request, response, or objection, and [certify] that to the best of his knowledge, information, and belief, formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose . . . and (3) not unreasonably or unduly burdensome . . . .

Id. The striking similarities in the language of Rules 11 and 26(g) are further indicia of a common purpose. The Advisory Committee specifically expressed this common purpose by noting the parallel relationship between the two rules. FED. R. CIV. P. 26 advisory committee note.

The Advisory Committee made some of its strongest statements with respect to abuse of the discovery process. "If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse." *Id.* Abuse of the system, particularly with respect to discovery, has enraged so many that there are clear statements, if not threats, suggesting the need to change the paradigm. *See* Levin, *Containing The Cost of Litigation,* 37 RUTGERS L. REV. 219 (1985).

may chill an attorney's zeal in the pursuit of his client's interests.[137] The criticism seems to be based on concern over the new standard that the Rule provides to determine whether an attorney's conduct is sufficiently violative to trigger the range of available sanctions. Specifically, by applying a more stringent standard than the showing of subjective bad faith that both the previous Rule and 28 U.S.C. § 1927 required, some critics fear that the Rule will constrain attorney creativity.[138] At the heart of the matter is a conflict between the Rule's sanctions against abusive behavior that falls short of bad faith and the adversarial model's principle of partisanship. Critics resent this intrusion into the sacred lair of the adversarial lion.

In response to these critics, commentators have posited that zealous representation and abusive behavior are not synonymous. "[V]igorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate. The lawyer's duty to place his client's interests ahead of all others presupposes that the lawyer will live with the rules that govern the system."[139] In effect, the 1983 amendments to the Rule represent a compromise between the need for greater attorney accountability and the desire for unhampered advocacy. Numerous competing interests require a balancing approach in reaching this compromise.

An underlying concern is the financial impact on the judicial system that has resulted from abusive litigation practices.[140] Abusive litigation is not the sole cause of the excessive costs imposed on the system,[141] however, it is certainly an important contributing factor. Unlike many other factors which have exacerbated the costs of the judicial system, abusive litigation practices are more easily identifiable and thus more easily subject to deterrence.[142]

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137. Schwarzer, *supra* note 9, at 184. *See also* Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 61-62 (1976) (suggesting that the concern over chilling counsels' zeal in advocacy was inherent in the pre-amendment provisions of Rule 11). *But see* FED. R. CIV. P. 11 advisory committee note (stating that the rule is not intended to have the chilling effect suggested by the rule's opponents).

138. Schwarzer, *supra* note 9, at 184.

139. *Id.*

140. *See generally* Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985) (analysis of and proposals for alleviating the litigation backlog in our courts).

141. *See generally Symposium, supra* note 5.

142. Some scholars, however, have questioned whether frivolous claims and pleadings constitute an appreciable part of the problem. Professor Miller has contended that no empirical study or similar data substantiates the claims. As he noted, "[w]e may be the victims of the phenomenon known as the cosmic anecdote: Someone tells a war story at one bar association meeting, and it is picked up by ten lawyers who then tell the same anecdote at ten

To exemplify the proposition that abusive litigation is identifiable and subject to control, one need only compare and contrast the difference between reported violations of Rule 11 before and after its amendment. A 1976 law review article indicated that only eleven reported cases resulted in affirmative findings of Rule 11 violations.[143] Since the amendment, however, a casual perusal of the Federal Supplement, the Federal Reporter, Second Series, and the Federal Rules Decisions reveals a multitude of cases where courts have imposed Rule 11 sanctions either sua sponte or, more often, upon a party's motion. Thus, contrary to the arguments suggesting that there is no real problem of abusive litigation practices,[144] the numerous reported cases in which courts have awarded attorney's fees indicate otherwise.[145]

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other bar association meetings. . . . " A. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 11-12 (1984).

143. Risinger, *supra* note 137, at 36.

> Of [those] 11 cases resulting in findings of violation, four were disposed of on other sufficient grounds so that the propriety of the alternative ground of "striking the pleading" was not readily testable on appeal. Of the remaining seven cases, no disciplinary action was taken against offending counsel in two and alternative sanctions were imposed on the attorneys involved in three. One case of striking was reversed on appeal and one case was ultimately successful.

Id. at 36-37. It should be noted, however, that because sanctions seldom appear in reported opinions, Professor Risinger's citation of only eleven cases may not be a reliable indicator of the actual frequency of sanctions, *See* Parness, *supra* note 114, at 31, col. 3 n.13 (citing S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 2 n.5 (1985).

144. *See* A. MILLER, *supra* note 142, at 30-31.

145. *See* Indianapolis Colts v. Mayor of Baltimore, 775 F.2d 177 (7th Cir. 1985) (awarding attorney's fees against movant where "a competent attorney reasonably should have recognized [that there was] no chance of success" both on the initial motion for fees and the appeal of the the trial court's denial thereof); Westmoreland v. Columbia Broadcasting Sys., Inc., 770 F.2d 1168 (D.C. Cir. 1985) (awarding costs, expenses, and reasonable attorney's fees against defendant for abuse of discovery and motions); *In re* TCI, 769 F.2d 441 (2d Cir. 1985) (awarding fees against attorney for abusive pleading); Di Silvestro v. United States, 767 F.2d 30 (2d Cir. 1985) (awarding attorney's fees against pro se litigant for commencement of a frivolous action in violation of an injunction); Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) (reversing a district court's denial of a motion for costs, expenses, and attorney's fees for filing a pleading devoid of legal or factual bases); Grindell v. American Motors Corp., 108 F.R.D. 94 (W.D.N.Y. 1985) (awarding costs and attorney's fees for abuse of the discovery process); Smith v. Egger, 108 F.R.D. 44 (E.D. Cal. 1985) (awarding costs and attorney's fees against party for filing pleadings devoid of a factual or legal basis); City of Yonkers v. Otis Elevator Co., 106 F.R.D. 524 (S.D.N.Y. 1985) (awarding fees against plaintiff for filing pleadings devoid of any factual basis); Barrios v. Pelham Marine, Inc. 106 F.R.D. 512 (E.D. La. 1985) (imposing monetary sanctions against defendant where third party complaint had no basis in fact or law); Nixon v. Individual Head of St. Joseph Mortgage Co., 612 F. Supp. 253 (N.D. Ind. 1985) (sua sponte award of attorney's fees against pro se plaintiff); Duncan v. WJLA-TV, 106 F.R.D. 4 (D.D.C. 1984) (awarding costs, attorney's fees, and expenses against plaintiff for filing a pleading containing easily discoverable erroneous information).

A parallel to the "chilling counsels' zeal" argument is the criticism of the Rule's potential for constraining attorney creativity.[146] This criticism is apparently based on the assumption that if courts impose stricter standards, then attorneys will be less likely to pursue innovative approaches to dispute resolution. That criticism, however, would appear to fly in the face of the Rule's language. The Rule explicitly allows pleadings grounded on "good faith argument for the extension, modification, or reversal of existing law."[147] Rule 11 thus encourages creativity by permitting good faith attempts to argue for changes in the law.[148]

Another important criticism of Rule 11 questions whether the increased capacity to move for sanctions will generate satellite litigation.[149] The importance of the question becomes apparent when one realizes that the costs of satellite litigation may offset, if not exceed, any benefits derived from the Rule's amendment. In practice, however, it is common for hearings on motions for attorneys' fees to occur simultaneously with other motions.[150] Thus, the dockets will not normally be burdened with a multiplicity of motion hearings. Concommitantly, the managerial judge hearing the motion is already familiar with the case, if not the cause of their motion itself, making further inquiry unnecessary. Leaving the timing for hearing a motion for sanctions to the court's discretion[151] virtually assures the most efficient use of resources. Although due process requires notice and an opportunity to be heard,[152] this opportunity may be defined by the

146. Schwarzer, *supra* note 9, at 184.

147. FED. R. CIV. P. 11.

148. Nevertheless, courts have held that a sanctions hearing is not the appropriate stage of the litigation to raise, for the first time, an argument that the pleadings are based on a "good faith argument for the extension, modification, or reversal of existing law." In one case, a district court imposed sanctions upon an attorney who had not indicated that his legal theory was based upon an extension of existing law. Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984). The court stated that "[t]here would be little point to Rule 11 if it tolerated counsel making an argument for the extension of existing law disguised as one based on existing law." *Id.* at 127. Thus, before a party can argue for a "good faith" modification of existing law, he must make clear that such modification is the basis of his argument. In Norton Tire Co. v. Tire Kingdom, Co., the court imposed sanctions against an attorney who framed his argument on precedent not binding on the circuit. 108 F.R.D. 371, (S.D. Fla. 1985). When questioned about the binding precedent of his own circuit, which conflicted with that which he cited, the attorney suggested that his argument was permissible under the good faith argument for modification of existing law provision of the Rule. The court nevertheless imposed sanctions because "counsel seem[ed] to have considered this point only after defendants moved for sanctions." *Id.*

149. Schwarzer, *supra* note 9, at 183.

150. *Id.* at 197; FED. R. CIV. P. 11 advisory committee note.

151. FED. R. CIV. P. 11 advisory committee note.

152. *See* Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951); Mullane v. Central

circumstances attendant to a particular situation.[153] Thus, the court may provide that process is due at an appropriate and cost efficient moment. The most appropriate moment usually occurs at the termination of the litigation when the court renders judgment.[154] Thus far, Rule 11 has apparently not fostered satellite litigation in practice. Nevertheless, a definite answer to this concern will only come with time.

Some critics have also expressed concern that the move away from the adversarial advocacy paradigm and toward increased judicial participation in all stages of litigation will result in judicial partiality.[155] Professor Resnick expressed this concern by noting earlier and more extensive judicial participation in the litigation.[156] Given that judges are already more extensively involved in the litigation at earlier stages, and in light of the increased capacity for imposition of sanctions pursuant to Rules 7, 11, 16(f), and 26(g), concern arises over the possibility that a judge's impression of and attitude toward a given party will be tainted. Although this is an important concern, bias is not new to the system.[157] It may be that the possibility of bias is inevitable in order to improve the litigation process. It can be argued that this merely reflects the compromise between the need for cost containment and greater attorney accountability and responsibility in litigation, and the adversarial advocacy paradigm. This does not suggest that bias is an acceptable by-product of reforming the system. Whether or not bias *actually* exists, however, is not something that has been reduced to empirical postulates. Judge Peckham, Chief Judge of the District Court for the Northern District of California, has suggested that exaggerated concern over bias is probably not warranted:

> Impartiality is a capacity of mind—a learned ability to recognize and compartmentalize the relevant from the irrelevant and to detach one's emotional from one's rational faculties. Only because we trust judges to be able to satisfy these obligations do we permit

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Hanover Bank & Trust, 339 U.S. 306 (1950); *see also* Schwarzer, *supra* note 9, at 198 (discussing the due process ramifications of Rule 11).

153. FED. R. CIV. P. 11 advisory committee note.

154. *Id.* at 200. *See also* Donaldson v. Clark, 786 F.2d 1570, 1576, *reh'g granted*, 794 F.2d 572 (11th Cir. 1986) (adhering to the advisory committee notes and recommending that the termination of the litigation is the appropriate time to rule on a motion for sanctions under Rule 11).

155. *See* Resnick, *supra* note 116, at 426-28.

156. *Id.*

157. For a discussion of judicial bias, see Hoeflich, *Regulation of Judicial Misconduct From Late Antiquity to the Early Middle Ages*, 2 LAW & HIST. REV. 79 (1984); Lindsley, *Ruling Without Bias*, 24 JUDGES' J. 18, 19-24 (1985).

> them to exercise such power and oversight. On the basis of this trust we permit the same judge who presides over a pretrial suppression hearing, where the defendants may solemnly proclaim their ownership of the seized evidence in order to establish their standing, to sit in the subsequent trial and issue further rulings.[158]

Finally, our judicial system is already designed to safeguard against such bias where it rises to a level affecting a party's substantive rights by providing for appellate review of court decisions. An appellate court may reverse a lower court's decision upon a finding that the trial judge abused his discretion.[159] For example, in *Eavenson, Auchmuty & Greenwald v. Holtzman*,[160] a district court judge imposed a monetary sanction on an attorney for whom the judge had great disdain based on prior dealings.[161] In imposing the sanction the district judge stated that "he could not 'look at [the] situation in isolation,' referred to a 'lot of problems . . . a lot of motions and a lot of harassment' which the district judge had encountered with appellant in another case . . . ."[162] The Court of Appeals for the Third Circuit reversed on appeal.[163]

Several critics have also questioned whether Rule 11 is permissible under the Rules Enabling Act.[164] Professor Burbank has reduced the problem to two questions.[165] The first question is whether the Court is empowered, under the Act, to establish "rules that authorize the imposition of sanctions, including reasonable attorney's fees, on parties or their attorneys for conduct that is negligent (or . . . nonwillful, not in bad faith, or whatever similar formulation is necessary to remove the proposed amendments from . . . section 1927 and inher-

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158. Peckham, *supra* note 140, at 262-63.

159. One circuit has enunciated a set of standards by which Rule 11 cases should be reviewed:

> If the facts relied upon by the district court to establish a violation of the Rule are disputed on appeal, we review the factual determinations of the district court under a clearly erroneous standard. If the legal conclusion of the district court that the facts constitute a violation of the Rule is disputed, we review that legal conclusion *de novo*. Finally, if the appropriateness of the sanction imposed is challenged, we review under an abuse of discretion standard.

Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986) (footnote omitted).

160. 775 F.2d 535 (3d Cir. 1985).

161. *Id.* at 543.

162. *Id.*

163. *Id.* at 544.

164. 28 U.S.C. § 2072 (1983). Although the interpretation of the Rules Enabling Act is outside the scope of this Comment, it is one that requires examination. For a thorough analysis of this issue, see Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

165. Burbank, *supra* note 123, at 1006.

ent power as defined in *Roadway Express*)."[166] Professor Burbank answered this question in the affirmative.[167] The second question is whether "the Supreme Court [has] the power under the Act to promulgate rules that *require* the imposition of sanctions in those circumstances."[168] This second question, as Professor Burbank has noted, is a much more difficult one.[169] Concern primarily seems to focus on the conflict between the purposes and functional standards of the amendment to Rule 11 and the legislative history of the 1980 amendment to 28 U.S.C. § 1927.[170] The record indicates that during discussion of the amendment to section 1927, Congress was firm in its stand to maintain a subjective bad faith standard.[171] In 1983, however, Congress accepted the amended Rules as presented[172]—Rules that mandated imposition of sanctions for conduct falling short of subjective bad faith.[173] Arguably, then, the Act is at least superficially satisfied. Although the issue is much broader than this, further analysis is beyond the scope of this Comment.[174]

C. *Advocacy in a New Key—The Changing Paradigm*

The adversary/advocacy model as described earlier in this Comment is at odds with the practical and theoretical foundations of the 1983 amendments to the Federal Rules of Civil Procedure. In its strictest sense, the model demands professional advocacy in a laissez faire context. In order to remain unhampered from any exterior forces, the foundation principles should support the advocate's conduct.[175] The amendments to Federal Rules of Civil Procedure 7, 11, 16(f), and 26(g) derogate these principles of unhampered advocacy. Thus, the question becomes whether the two competing interests may peacefully coexist. It is the compromise between these competing ideologies that gives rise to "advocacy in a new key," a changing paradigm.

Advocacy in a new key arises in two mutually dependent contexts—the advocate's role as a professional and a new model of judi-

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *See* 126 CONG. REC. H8047 (daily ed. Aug. 28, 1980).
171. *Id.*
172. Letter of Transmittal from Chief Justice Burger to Congress (April 28, 1983), *reprinted at* 461 U.S. 1096 (1983).
173. *Id.* at 1104.
174. For a comprehensive discussion of the Rules Enabling Act, see Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).
175. *See supra* notes 125-30 and accompanying text.

cial management. The advocate's role is one of greater responsibility and accountability—accountability to his colleagues, clients, and to the bench. The judge's new role calls for more active participation in all phases of the litigation process. Of immediate concern to the advocate is the requirement that a lawyer must now engage in more pretrial preparation. In lieu of the old practice of merely signing the pleadings, motions, or other papers, a lawyer must now conduct a reasonable inquiry into the facts and law of the matter he is pressing. Thus, one must "ask questions first" and file later. The penalty for failure to do so may have a direct economic impact on the abusive advocate.

Within this framework, the judge is required to play an active role. Judges must hear parties' motions for such sanctions or may sua sponte consider the necessity of imposing sanctions. Moreover, a judge shall impose sanctions where the circumstances of a particular case warrant such action. In addition to the broader range of sanctions available to judges, the procedural definitions of judicial management have also been broadened. For example, in drafting the amendments to Rule 16, "[t]he advisory committee's explicit goal . . . was to legitimize judicial management and to encourage district judges to recognize it as part of their duties."[176] Rule 16 provides that with the exception of certain categories of actions, "the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order . . . ."[177] The scheduling order sets time frames for the occurrence of certain phases of pretrial procedure. The expanded nature of judicial involvement thus represents one of the clearest signals of a shift towards a new model of advocacy.

V. CONCLUSION

In this Comment, the authors have attempted to analyze the practical impact of the 1983 amendment to the Federal Rules of Civil Procedure, in light of the concerns they represent. In doing so special attention was paid to Rule 11. The underlying premises of Rule 11 go to the crux of our changing legal system. The Rule represents a rules-oriented approach to deterring abusive litigation practices as a step in the move to arrest the climbing costs of litigation. It would be naive to suggest that it is possible to resolve the entire system's financial woes

176. Miller & Culp, *The New Rules of Civil Procedure: Managing Case, Limiting Discovery*, Nat'l. L.J. Dec. 5, 1983, at 23, col. 2.

177. FED. R. CIV. P. 16.

with a few bold strokes of a pen. Yet, it cannot be denied that abusive litigation is one identifiable cause of the problem. Furthermore, it is a problem that may be resolved through reform of the system. Hence, changing the rules in a manner responsive to the problems plaguing the system is a step towards attaining the purposes of the prescribed reform.

The Rules, however, are merely parts of the whole. They are an integral and essential component of a changing adversarial model. The change is a compromise between the ideal adversarial advocacy model and a new and developing paradigm grounded on increased judicial management and greater attorney accountability. The old model was the product of a laissez faire approach to the judicial system, whereas the new model requires greater judicial participation. Not surprisingly, a protectionist attitude towards the old paradigm has given rise to numerous criticisms of the newly established procedural mechanisms enacted to quell some of the detrimental effects of a laissez faire judicial system.

Most of the criticisms of the amendments are apparently products of faithful adherence to a faltering system. Such adherence ignores certain competing systems oriented goals. "[T]here is nothing sacrosanct about the adversarial system. It is a mere instrument by which to achieve the just resolution of disputes. If it can no longer fulfill that function effectively, it must be modified."[178] An analysis of the provisions of amended Rule 11, in theory and in practice, reveals that the move away from a "hands off" approach is not the bane that its critics characterize it to be. In fact, by its own terms, Rule 11 mandates that attorneys be more accountable for their actions.

Commentators have criticized Rule 11's provisions requiring a prefiling inquiry into the factual and legal bases of a pleading, motion, or other paper as overly intrusive into the standard norm of practice. The most emotional concern is with the standard courts are to use in measuring whether an attorney's conduct is sufficiently violative of the Rule so as to mandate the imposition of sanctions. The previous practice was to measure an attorney's conduct against a subjective bad faith standard. The new standard, however, is one of reasonableness under the circumstances—an objective standard. Critics suggest the new standard will discourage zealous advocacy.

The Rule, however, in practice and by its own terms, should do no such thing. If requiring an inquiry into the basis of a claim is to have a chilling effect, then it would seem that our values are mis-

178. Peckham, *supra* note 140, at 265.

placed. The actual benefits derived from such a standard appear to be quite the antithesis of the dreaded harms. In other words, a requirement to make reasonable inquiry should result in higher quality litigation. Thus, a benefit inures to the client, who gets "more lawyer for his money." Arguably, then, this does not really undermine or challenge the advocacy model. Instead, it increases professionalism. Moreover, there is no dampening of creativity because the Rule still invites counsel to make good faith arguments for a change of existing law.

Finally, Rule 11 calls for reasonable application of its provisions. Thus, the Rule is not finite, inflexible, nor talismanic in nature. Instead, a review of cases in this area indicates that where circumstances have warranted penalization, the courts have imposed sanctions. Of equal, if not greater importance, is the fact that where judges do overstep the bounds of the Rule, systematic safeguards exist to review their decisions.

The 1983 amendments to the Federal Rules of Civil Procedure are a rational and systematic response to an identified problem. Such reforms should be encouraged. Members at all levels of the judiciary support this continual evolution toward a better system. The Chief Justice of the United States has expressed his support for the active pursuit of this worthy goal. In the foreword to Rutgers University's *Symposium on Reducing the Costs of Civil Litigation*, Chief Justice Burger stated:

> [t]he increased use of sanctions for abuse of discovery and other processes deserve[s] careful consideration and experimentation. They should be adopted if demonstrably successful.
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> . . . .
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> All of these ideas and more are most welcome. I hope they will prompt debate and discussion and renewed efforts . . . .
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> . . . .
>
> Judicial Administration needs tireless, articulate workers. It needs new ideas.[179]

In *Henry VI*, William Shakespeare suggested, "[t]he first thing we do, let's kill all the lawyers."[180] Perhaps this proposal is somewhat exaggerated. We should take heed, however, that it is our duty and responsibility to seek out more efficient and responsive solutions to the problems plaguing the legal system. "Case management . . . may be enough to eliminate the needless costs of litigation and so make

179. Burger, *Introduction, Symposium: Reducing the Costs of Civil Litigation*, 37 RUTGERS L. REV. 217, 218 (1985).

180. W. SHAKESPEARE, HENRY VI, Pt. II, Act II.

other, more drastic steps unnecessary."[181]

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181. Peckham, *supra* note 140, at 277.

* I would like to thank my wife Stacey for her love, support, and patience. I would also like to thank my mother, Helen Lender, and her family for their constant guidance and assistance. I dedicate this Comment to the memory of my father, Elliott DuBosar.

** I dedicate this article to those who have made a difference in my life: my parents, Ubaldo Sr. and Helga, and to Romi. Thanks for your love.